

Decision No. C99-419

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 99A-001T

IN THE MATTER OF THE PETITION OF AIRTOUCH PAGING, INC., FOR
ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH U S WEST
COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. § 252.

DECISION REGARDING PETITION FOR ARBITRATION

Mailed Date: April 28, 1999

Adopted Date: April 23, 1999

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I. BY THE COMMISSION**A. Statement**

This matter comes before the Commission for consideration of the Petition for Arbitration filed by AirTouch Paging, Inc. ("AirTouch" or "Petitioner") on January 4, 1999. Pursuant to the provisions of 47 U.S.C. § 252 of the Telecommunications Act of 1996 ("Act"),¹ AirTouch requests that, through this arbitration, we establish the rates, terms, and conditions to be included in its interconnection agreement with U S WEST Communications, Inc. ("USWC" or "Respondent"). USWC filed its Response to the Petition on January 29, 1999. The parties submitted prefiled testimony in accordance with prior orders of the Commission, and we conducted evidentiary hearings in this case on March 29-30, 1999. On April 8, 1999, both AirTouch and USWC submitted their Post-Hearing Briefs. Now being duly advised in the matter, we enter our arbitration decision.

B. Discussion**1. Introduction**

a. Petitioner is a Commercial Mobile Radio Service ("CMRS") provider and a telecommunications carrier under the Act. AirTouch offers one-way paging services in virtually

the entire State. According to the Petition, AirTouch, over its network, provides paging services to approximately 80,000 messaging units in Colorado. Respondent is an "incumbent local exchange carrier" ("ILEC") as that term is defined in § 251(h)(1) of the Act.

b. Section 251(c) of the Act imposes certain obligations upon ILECs such as USWC, including the duty to interconnect its network with the networks of other telecommunications carriers, and the duty to negotiate in good faith the terms of an interconnection agreement with a requesting telecommunications carrier. In this case, AirTouch formally requested interconnection negotiations with USWC on July 28, 1998. While the parties agreed on some provisions for an interconnection agreement, a number of significant issues remained unresolved. AirTouch, petitioned the Commission to arbitrate these open issues. The issues before the Commission include: (1) whether AirTouch, as a one-way paging provider, is legally entitled to termination compensation for traffic originating on USWC's network; (2) whether USWC may charge AirTouch for the dedicated facilities provided to connect AirTouch's paging terminal to USWC's network; (3) assuming

¹ Section 252(b) provides that, upon request, a State commission (e.g. the Colorado Public Utilities Commission) shall arbitrate disputes between telecommunications carriers negotiating an interconnection agreement.

AirTouch is entitled to termination compensation, what is the appropriate compensation (e.g. what are AirTouch's costs; what portion of traffic delivered to AirTouch over USWC's network is transit traffic² or otherwise not compensable); (4) what grade of service must be provided by USWC to AirTouch; (5) whether AirTouch is required to establish more than a single point of connection with USWC's network within each Major Trading Area ("MTA") or wireless local calling area; (6) whether USWC will be required to separate "rating points" from "routing points" for interconnection facilities; (7) how the interconnection agreement should incorporate AirTouch's rights under § 252(i) of the Act; and (8) what should be the effective date of the interconnection agreement and certain terms within the agreement (i.e. terms relating to termination compensation for AirTouch, and to AirTouch's claimed exemption from facilities charges). The discussion below sets forth our decision on these issues.

2. Termination Compensation

a. Section 251(b)(5)³ of the Act provides that each local exchange carrier has, "The duty to establish reciprocal compensation arrangements for the transport and

² As explained *infra*, "transit traffic" is traffic originating outside of USWC's network, on the network of some other carrier, and merely transits USWC's network enroute to AirTouch. AirTouch agrees that it is obligated to pay USWC for such traffic. AirTouch also agrees that it is obligated to pay USWC for the portion of those facilities due to transit traffic.

³ 47 U.S.C. § 251(b)(5).

termination of telecommunications." In this case, USWC disputes AirTouch's legal entitlement to termination compensation, under § 251(b)(5), for calls from USWC's end-users to AirTouch paging customers. USWC argues: AirTouch is not entitled to termination compensation because § 251(b)(5) contemplates circumstances in which telecommunications carriers perform a reciprocal function. That is, § 251(b)(5) is intended to apply to arrangements where each telecommunications carrier originates and terminates local calls on the other contracting carrier's network. There is no reciprocity here, since AirTouch's paging customers are physically unable to originate traffic that USWC could terminate on its own network. Therefore, § 251(b)(5) does not apply to interconnection agreements between an ILEC and paging providers.

b. USWC further contends: that the Federal Communications Commission's ("FCC") First Report and Order does not legally entitle paging providers to termination compensation,⁴ and that AirTouch's citations to the first report are inapposite. Airtouch relies on paragraphs 1008 and 1092 of the First Report and Order, which speak to payment of reciprocal compensation for "the transport and termination of traffic...." Accordingly, to prove an entitlement to termination

compensation, AirTouch must demonstrate that it transports and terminates traffic over its network. The FCC, in 47 C.F.R. § 51.701(c), defines "transport" as, "[T]he transmission and any necessary tandem switching of local telecommunications traffic...from the interconnection point between the two carriers to the terminating carrier's end office switch that directly services the called party, or equivalent facility..." (emphasis added). Rule 47 C.F.R. § 51.701(d) defines "termination" as, "[T]he switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises" (emphasis added). Under the FCC's rules, therefore, AirTouch must prove that its equipment performs switching functions.

c. USWC suggests that the record demonstrates that AirTouch's equipment does not carry out switching functions, nor is AirTouch's equipment equivalent to a switch. Essential features of a switch include: the capacity to make real-time circuit connections from lines to lines, lines to trunks, and trunks to trunks; providing dial-tone to end-users; and telephone number management (e.g. receiving and recognizing

⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Red. 15,499 (1996).

dialed numbers). The equipment used by AirTouch in its paging business has none of these features. Moreover, the AirTouch equipment cannot be characterized as either end-office or tandem switches because it could not function in the public switched telephone network ("PSTN").

d. AirTouch responds that its equipment does perform switching functions, and is an "equivalent facility" under the FCC's rules. For example, AirTouch contends that its paging terminal, the Glenayre mainframe, performs switching functions including answer supervision, disconnect supervision, telephone number assignment management, and the switching of incoming calls from a trunk group to other facilities. Nothing in the FCC's rules relating to termination compensation require that an "equivalent facility" be capable of replacing an end-office or tandem switch in the PSTN, or that such equipment be capable of establishing real-time connections as contended by USWC.

e. More importantly, AirTouch argues, the FCC (in the First Report and Order) has already determined that one-way paging providers are entitled to termination compensation, and that determination is binding upon the Commission for purposes of this proceeding. USWC's argument that AirTouch is not legally entitled to termination compensation constitutes an

impermissible collateral attack on the FCC's rules implementing § 251(b)(5).

f. Because we agree with AirTouch regarding the effect of the FCC's decisions on this issue,⁵ we conclude that it does possess a legal entitlement to termination compensation.⁶ It is our understanding of the First Report and Order that the FCC has determined that paging providers do terminate local calls, and, therefore, are entitled to compensation from local exchange carriers. Notably, the FCC stated:

Under section 251(b)(5), LECs have a duty to establish reciprocal compensation arrangements for the transport and termination of "telecommunications." (footnote omitted) Under section 3(43), "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." (footnote omitted) All CMRS providers offer telecommunications. Accordingly, LECs are obligated,

5 We are not entering an independent (of the FCC's rules) decision as to whether the functions performed by AirTouch in delivering a paging call to its customer come within the scope of § 251(b)(5). As explained *supra*, we agree with AirTouch that the FCC's directives on this matter preempt any independent determination that we might make on this question. We note, however, that our independent conclusion would be that AirTouch is not terminating "telecommunications" (defined in 47 U.S.C. § 3(48)) for purposes of § 251(b)(5). AirTouch, in its one-way paging service, does not terminate the actual call from the USWC end-user. Rather after the call from the USWC end-user has been completed to the AirTouch paging terminal and the calling party has ended the call by "hanging-up," AirTouch then proceeds to deliver a separate and distinct message to the paging customer. Since no actual connection between the USWC end-user and the AirTouch paging customer ever exists, we would conclude that AirTouch's operation do not constitute the "termination of telecommunications" for purposes for § 251(b)(5). We would conclude that the function performed by AirTouch is essentially an enhanced service, rather than the termination of telecommunications traffic.

⁶ Because we conclude that AirTouch failed to present credible evidence of its costs, USWC will not be ordered to pay compensation to AirTouch at this time. See discussion *infra*.

pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, pursuant to the rules governing reciprocal compensation set forth in Section XI.B, below.

(emphasis added) First Report and Order, paragraph 1008.

Accord First Report and Order, paragraph 1093 (in arbitration of interconnection agreements State commissions directed to establish rates for the termination of traffic by paging providers based upon forward-looking costs of such termination to paging provider).

g. In light of these statements by the FCC, we do not have the prerogative to rule, as USWC suggests, that AirTouch does not terminate calls as defined by the FCC. Consequently, we conclude that Petitioner, even as a one-way paging provider, is legally entitled to termination compensation pursuant to § 251(b)(5). The discussion below sets forth our conclusion regarding the appropriate compensation rate for purposes of this docket.⁷

⁷ As for the economic validity of paying termination compensation to AirTouch, we concur with the conceptual analysis regarding interconnection between an ILEC and a provider of paging services suggested by USWC witness Dr. Taylor. He suggested that interconnection between an ILEC and a provider of paging services, such as Air Touch Paging, Inc., is fundamentally different from other interconnection agreements, because the traffic, in this instance, is all one way (from the ILEC to the provider of paging service), and because the provider of paging services does not terminate calls in a conventional sense of the term and so incurs no termination costs. Dr. Taylor reasoned that reciprocal compensation is not warranted because calls are not terminated on the pager terminals. Rather, USWC incurs the cost for both originating and terminating the calls. The Commission agrees with this

3. Compensation for Facilities Provided to AirTouch

a. This issue concerns AirTouch's claim that, pursuant to FCC rules, it need no longer pay for facilities used to interconnect its network with USWC's. According to Respondent, this claim constitutes a demand that USWC provide AirTouch with dedicated interconnection facilities, trunk lines ordered by AirTouch for its exclusive use, for free. USWC argues that, regardless of its legal entitlement to termination compensation, AirTouch should be required to pay charges associated with the provision of these interconnection facilities.

b. We essentially agree with USWC's characterization of AirTouch's position: Petitioner is demanding free facilities to be utilized in the provision of its own paging services. Despite this, AirTouch's interpretation of the current state of FCC rules appears to be correct. Nevertheless, for the reasons explained below, we will not at

reasoning. Moreover, we find that the traditional originating-carrier-as-cost-causer assumption, which applies to two-way interconnection, does not apply to one-way providers. A paging service exists for one reason only, namely, to enable paging customers to be contacted by specific individuals to whom the number has been given. It is, therefore, the provider of paging services, such as Air Touch, who is the cost-causer. As such, compensation should be due USWC, not the other way around. We conclude that a number of economic inefficiencies will result from paging providers receiving termination compensation from LECs: excessive use of paging services, overinvestment in paging-related facilities, excessive entry into the market by new providers of paging services, prices possibly set below incremental costs, and cross-subsidization of customers who call pagers by those who do not.

this time order USWC to cease charging AirTouch for facilities provided to it.

c. AirTouch's claim to free facilities is based upon FCC Rule 47 C.F.R. § 51.703(b), and statements in paragraph 1042 of the First Report and Order. Rule 703(b) provides that, "A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." Similarly, in paragraph 1042, the FCC stated that, "As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge."

d. USWC contends that the directives in Rule 703(b) and paragraph 1042 prohibit only charges for the termination of traffic, not to charges related to the provision of interconnection facilities. According to this argument, the provision of dedicated facilities for the delivery of traffic to AirTouch implicates USWC's interconnection obligations under 47 U.S.C. § 251(c)(2).⁹ The provision of such interconnection facilities, does not arise under § 251(b)(5)⁹ and its

⁹ Section 251(c)(2) sets forth an ILEC's obligation, "[T]o provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network...."

⁹ As explained above, § 251(b)(5) sets forth a LEC's obligation to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

implementing regulation, Rule 703. USWC further points out that, with respect to an ILEC's interconnection duties, 47 U.S.C. § 252(d)(1) provides that the just and reasonable rate for interconnection is to be based upon the cost of providing that interconnection.

e. USWC contends that AirTouch is the party causing the costs associated with the facilities provided to it, and, under well-settled economic principles, should pay for those facilities. Requiring USWC to provide free facilities to AirTouch will also constitute a taking of Respondent's property without compensation. That is, since AirTouch's paging customers will not originate calls for termination on USWC's network, USWC will never receive compensation for the facilities requested by AirTouch and dedicated to its use (especially under AirTouch's position concerning termination compensation for traffic delivered to its network). USWC, in short, will have no ability to earn revenue from the facilities dedicated to AirTouch under Petitioner's position.

f. In response, AirTouch contends that the FCC's directives (i.e. Rule 703(b) and the interpretation of that rule) are dispositive of this issue. Specifically, AirTouch notes that the Chief of the Common Carrier Bureau has

issued an interpretation of Rule 703(b), the Metzger Letter,¹⁰ which holds that LECs are not permitted "to assess charges on CMRS carriers to recover the costs of facilities that are used by LECs to deliver traffic to CMRS carriers." This ruling by the Common Carrier Bureau, AirTouch argues, preempts the Commission from accepting USWC's position and ordering AirTouch to pay facilities charges.

g. USWC suggests that the Metzger Letter is not binding on the Commission. According to USWC, the letter is not an FCC order or rule, but merely an interim interpretation of the FCC's rules by a single staff member. AirTouch, in contrast, states that the Metzger Letter represents official action by the FCC consistent with its authority to delegate certain functions to the Chief of the Common Carrier Bureau. Under that delegated authority, the Common Carrier Bureau is empowered to act for the FCC in the manner represented in the Metzger Letter. See 47 C.F.R. § 0.91 (Common Carrier Bureau acts for the FCC under delegated authority in matters pertaining to regulation of communication common carriers); 47 C.F.R. § 0.291 (Chief of the Common Carrier Bureau delegated authority to perform all functions of the Bureau as described in § 0.91).

¹⁰ The Metzger Letter was included in this record as Exhibit J to Appendix A of the Petition for Arbitration.

AirTouch also points out that the Metzger Letter was issued pursuant to notice and comment procedure.

h. As noted above, we agree with USWC's characterization of AirTouch's request here: Petitioner is seeking free facilities for use in the provision of its paging services. We concluded in footnote 5 that it is inappropriate to require a LEC to pay reciprocal compensation to paging providers. For the same reasons, we find that, AirTouch should not be entitled to use USWC transport and switching facilities dedicated to the delivery of its one-way traffic without compensating USWC. It makes good economic sense that AirTouch should pay for the non-recurring and maintenance costs associated with those facilities. Otherwise, the economic inefficiencies listed with respect to termination compensation will be exacerbated. Additionally, we note that the provision of free facilities to AirTouch will motivate it to demand dedicated facilities from USWC in greater quantity and quality than it would demand if it had to pay the applicable costs. Here again, AirTouch is the cost-causer and should be required to pay accordingly.

i. In light of these findings, we have serious reservations regarding the legality of AirTouch's request that it be excused from paying facilities charges. USWC correctly points out that without such charges it may not be compensated

for the costs of the facilities requested by and dedicated to AirTouch's use. This result could, in the absence of further regulatory action, constitute a taking without just compensation.¹¹ See, U.S. Constitution, Amendment V. Nevertheless, we agree with AirTouch's contention about the Metzger Letter and the present state of the law at the FCC.¹² It appears that the Metzger Letter constitutes official action by the FCC. USWC cites no persuasive authority which would allow us to enter a ruling in this case which contravenes the holding in the Metzger Letter.

j. Notwithstanding this conclusion, we will not order USWC to cease assessing facilities charges upon AirTouch at this time. Notably, AirTouch concedes that it is obligated to pay for the portion of USWC facilities used to deliver exempt traffic (i.e. non-local and transit) to it. The discussion below explains that AirTouch has failed to present acceptable information regarding the extent of exempt traffic being delivered to its network by USWC. Furthermore, the record here

¹¹ Since this is the result of FCC action, if the FCC affirms the Metzger interpretation, the responsibility for instituting some charge or mechanism to avoid an uncompensated for taking will not lie with any agency of the State of Colorado, but, we believe, with some federal authority.

¹² The parties point out that the Metzger Letter is presently under review by the FCC itself. We note, especially given the policy and legal ramifications of the Metzger Letter, that USWC's interpretation of Rule 703(b) and paragraph 1042 of the First Report and Order appears to be the most reasonable one.

(e.g. the Metzger Letter itself) indicates that whether LECs may assess facilities charges upon paging providers is presently subject to petitions for reconsideration before the FCC. In light of these facts, we will not order USWC to cease assessing facilities charges upon AirTouch as part of this proceeding.

4. AirTouch's Cost Study and Appropriate Compensation

a. Notwithstanding its legal entitlement to termination compensation, AirTouch is still required to demonstrate its costs. One component of proof of these costs is the portion of compensable traffic¹³ delivered to AirTouch by USWC. The FCC directed that paging providers bear the burden of proving their costs. See paragraph 1093, First Report and Order (paging providers seeking termination fees must prove to state commissions costs of terminating local calls; default price for termination of traffic adopted in proceeding does not apply to paging providers). We find that AirTouch did not present acceptable evidence of its costs that would enable us to establish compensation rates to be paid by USWC. Additionally, AirTouch's failure to present acceptable evidence regarding the proportion of compensable traffic delivered to its network by

¹³ AirTouch concedes that it is entitled to termination compensation only for compensable traffic, that is, local traffic and traffic originated on USWC's network. Therefore, AirTouch agrees, no termination compensation should be paid for non-local and transit traffic. Further, AirTouch also agrees that it is obligated for the portion of USWC facilities used to transport non-compensable traffic to its network.

USWC supports our decision not to order Respondent to cease assessing charges for facilities provided to AirTouch.

b. With respect to the specific termination compensation rate to be paid to AirTouch, we agree with USWC that AirTouch failed to offer satisfactory evidence of its costs. First, and most importantly, we conclude that only the costs of the paging terminal should be included in a cost study for a one-way paging provider. AirTouch's study included the costs of all network components beyond the terminal. As USWC pointed out, the "originating caller" on a page does not communicate directly with the pager. The caller communicates solely with the paging terminal, which does not perform "switching" to complete the circuit involved in the call. The terminal merely records data and initiates another telecommunication, in essence becoming the "originating caller." Therefore, a paging call consists of two completely separate processes. As such, no costs beyond the paging terminal should be included in the study intended to establish appropriated termination compensation rates. AirTouch's cost study did not comply with this principle, and cannot serve as the basis for our determination regarding termination compensation.

c. Additionally, we agree with USWC that AirTouch's study is unreliable for various reasons. Notably, AirTouch continued to make changes to the study throughout this

proceeding; indeed, even on the first day of hearing. USWC correctly pointed out that significant components of the study remained unsupported by credible information including the cost allocations between paging and voice mail; the decision to model AirTouch's forward-looking network with one terminal instead of the two terminals presently in place;¹⁴ the assumed growth in subscribers over the seven-year study period; the assumed utilization rates; and the amounts of assumed investment for major elements in the study such as the radio frequency sites. AirTouch's failure to satisfactorily explain and support these aspects of its study renders it unreliable for purposes of setting termination compensation rates in this case. Because of this finding, we set the termination compensation rate for AirTouch at \$0.00 per page.

d. The portion of traffic deemed to compensable (i.e. local and non-transit) also affects the compensation issues in this proceeding, such as the portion of facilities for which AirTouch will be obligated to pay. Since this issue is directly related to the appropriate amount of compensation due AirTouch under FCC directives, we conclude that AirTouch has the burden of establishing the percentage of traffic which is compensable.

¹⁴ The evidence is inadequate to prove that this would be the least-cost approach.

e. The parties each submitted estimates of the percentage of transit (or non-compensable) traffic based upon surrogate studies. These estimates differ substantially. We find that neither party's estimate of transit traffic is acceptable in this case, especially in light of existing technology which would enable measurements of actual traffic. Therefore, we will defer establishment of a compensable traffic percentage until the parties provide an acceptable study. In the absence of good cause, the study should be based upon actual measurements of non-compensable or transit traffic (i.e. using SS7 technology).

5. Grade of Service

a. Commission Rule 3.3.3, 4 CCR 723-39, governing interconnection states that "Telecommunications providers shall provide for the interconnection with the facilities and equipment of any requesting telecommunications provider...that is at least equal in quality to that provided by the provider to itself or to any subsidiary, affiliate, or any other party to which the provider interconnects..." This rule requires that quality-of-service that can be reasonably expected by a user of the PSTN; it does not require a guarantee of an uninterrupted quality-of-service. In the PSTN, a P.01 grade-of-service, as requested by AirTouch in this docket, relates to trunk-blockage probability. This is dependent not only on the

types of facilities furnished by the provider, but also on the facilities configuration and forecasts of the requesting party.

b. We find AirTouch's apparent request for a P.01 quality-of-service guarantee at all times to be unrealistic, especially with respect to the traditional provisioning of service on the PSTN. To the extent that a grade-of-service is designated in the interconnection agreement, USWC is required only to engineer to a P.01 standard and will not be held to a guarantee of that standard at all times.

6. Points of Connection

a. AirTouch has suggested that, as a legal matter,¹⁵ it need establish only a single point of interconnection with USWC in its entire MTA. Notwithstanding this legal entitlement, AirTouch proposes that USWC be required to haul traffic to interconnect with AirTouch only to a distance of 90 miles or to the intraLATA boundary, whichever is less. USWC opposes AirTouch's request.

b. USWC correctly points out that the Act (47 U.S.C. § 271) precludes it from hauling traffic across the LATA boundary in Colorado. As such, AirTouch's claim of a legally enforceable right to interconnection at only a single point within the MTA is incorrect.

¹⁵ This assertion is based upon the FCC's determination that the MTA is the local calling area for CMRS providers.

c. USWC also argues that, in any event, AirTouch's request is inappropriate, because it would transform USWC's intraLATA network into a local network for AirTouch's paging traffic. As noted by Respondent, USWC has many different local calling areas in Colorado connected by a separate toll network. If the definition of "local calling" is effectively expanded as advocated by AirTouch, USWC would be required to reconfigure its network to permit customers to call AirTouch without a toll charge. Further, AirTouch's position would require USWC to absorb the costs of this reconfiguration, while also losing revenues from the use of the intraLATA toll network by customers calling AirTouch's customer. Finally, USWC notes that rerouting calls from remote local calling areas to the AirTouch terminal over a toll network would impose continuing costs associated with switching each call through the access tandem.

d. We find in favor of USWC on this issue, for the reasons stated by USWC. By utilizing the PSTN to route calls to its network, AirTouch must abide by the economic and engineering principles which otherwise govern the provision of service on the PSTN. Therefore, absent specific arrangements with USWC (e.g. purchasing tariffed services from USWC for the transport of traffic to an AirTouch terminal located outside of a local calling area), AirTouch will be required to have a point

of connection within each EAS/local calling area where it has NXXs assigned and a physical point of connection within the serving area of the end office housing the DID number associated with AirTouch's Type 1 service. Existing facilities and points of connection are acceptable, if USWC is not required to backhaul traffic without compensation.

7. Separation of Rating and Routing

This question is related to the above issue concerning points of connection. Again, we adopt USWC's position. In accordance with this conclusion, AirTouch will be required to establish both routing points and points of connection within the serving areas of USWC's local and toll tandem switches that may serve the established rating centers associated with any NXX block.

8. Section 252(i) Obligations

a. Section 252(i)¹⁶ requires a LEC to make available "any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." Petitioner and Respondent disagree as to how these § 252(i) provisions will be incorporated into their interconnection agreement.

b. As noted by the parties, the FCC adopted Rule 809¹⁷ to implement § 252(i); that rule was affirmed by the Supreme Court in *AT&T v. Iowa Utilities Board*, 119 S.Ct. 721 (1999). Therefore, the interconnection agreement between the parties should reflect AirTouch's rights under § 252(i) to elect terms and conditions from other approved agreements consistent with Rule 809.¹⁸ We note that the FCC's directives regarding § 252(i) permit AirTouch to modify its existing agreement by electing terms and conditions from a subsequently approved agreement. See First Report and Order, paragraph 1316. We note in passing, that this creates ample deleterious ex ante incentives for the parties, and indeed, is anathema to the very nature of contracts. But that is what the FCC has decreed.

9. Effective Date of Agreement

a. Finally, the parties disagree about the date when certain terms in their interconnection agreement are to take effect. The significance of this question relates to compensation matters: AirTouch contends that the directives concerning payment of termination compensation to AirTouch and

¹⁶ 47 U.S.C. § 252(i).

¹⁷ 47 C.F.R. 51.809.

¹⁸ Rule 809 does place limits upon a carrier's ability to choose new terms and conditions from other approved interconnection agreements. Whether AirTouch will be able to elect specific new terms and conditions in accordance with Rule 809 is a factual matter which, in the event of disagreement, must be decided in the future.

the percentage of facilities charges payable by AirTouch (i.e. only for exempt traffic) should be effective July 28, 1998, the date negotiations between the parties commenced. AirTouch argues that the First Report and Order (paragraph 1042) and Rule 717¹⁹ support a retroactive effective date. Furthermore, AirTouch contends that refusal to approve a retroactive effective date, as requested, would reward USWC for its delay in recognizing AirTouch's rights under the Act.

b. We agree with USWC that the effective date for all terms in the interconnection agreement should be the date the agreement is approved by the Commission. Our decisions relating to termination compensation and facilities charges mitigate the significance of this issue. Nevertheless, we observe that neither Rule 717 nor paragraph 1042 support AirTouch's position. Rule 717 permits two-way CMRS providers to use a LEC's pre-existing transport and termination rate as a proxy for their costs for transport and termination prior to the negotiation or arbitration of an interconnection agreement. Paragraph 1042 requires that, as of the effective date of the First Report and Order, an ILEC must cease charging CMRS providers for terminating ILEC-originated traffic.

c. On their face, neither provision directs

¹⁹ 47 C.F.R. § 51.717.

that one-way paging providers are entitled to specific compensation as of a specific date. To the contrary, the FCC, in the First Report and Order, determined that there was insufficient information in the record to establish a default rate for termination of traffic by paging providers. The FCC further directed that paging providers seeking termination compensation must prove their costs to State commissions in specific proceedings. These particular holdings are inconsistent with AirTouch's position. Moreover, given our above conclusions regarding termination compensation and facilities charges, it would be inappropriate to penalize USWC for its refusal to agree to AirTouch's position on these questions. We conclude that applicable law requires that the effective date of the interconnection agreement between USWC and AirTouch be the date the agreement is approved by the Commission.

10. Motion for Leave to File Late-Filed Exhibit

On April 19, 1999, USWC submitted its Motion for Leave to File Late-Filed Exhibit. Good cause having been stated, we will grant the motion.²⁰

²⁰ The matters discussed in the exhibit relate to new information submitted by AirTouch in its Post-Hearing Brief (footnote 28). We also consider the new information presented by AirTouch for purposes of this decision.

II. ORDER

A. The Commission Orders That:

1. The issues presented in the Petition for Arbitration filed by AirTouch Paging, Inc., on January 4, 1999 are resolved as set forth in the above discussion.

2. Within 30 days of the final Commission decision in this docket, AirTouch Paging, Inc. and U S WEST Communications, Inc. shall submit a complete proposed interconnection agreement for approval or rejection by the Commission, pursuant to the provisions of 47 U.S.C. § 252(e) of the Telecommunications Act of 1996.

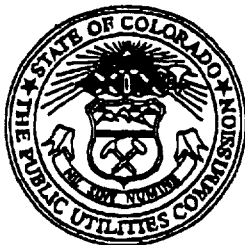
3. The Motion for Leave to File Late-Filed Exhibit submitted by U S WEST Communications, Inc. on April 19, 1999 is granted. Response time to the motion is waived.

4. The twenty-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this decision.

5. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING
April 23, 1999.**

(SEAL)



**THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

ROBERT J. HIX

VINCENT MAJKOWSKI

RAYMOND L. GIFFORD

Commissioners

ATTEST: A TRUE COPY

A handwritten signature in dark ink, appearing to read "Bruce N. Smith".

Bruce N. Smith
Director

COPY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RETURN

In the Matter of)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

Inter-Carrier Compensation)
for ISP-Bound Traffic)

To: The Commission)

CC Docket No. 96-98

CC Docket No. 99-68

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COMMENTS OF AIRTOUCH PAGING

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April 12, 1999

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Summary

AirTouch Paging ("AirTouch") is responding to the request at paragraph 35 of the Notice of Proposed Rulemaking in this proceeding for comments on whether and how Section 252(i) most-favored-nation rights affect carrier efforts to negotiate or renegotiate interconnection contracts. Because AirTouch has invoked Section 252(i) with several local exchange carriers in an effort to adopt previously approved agreement, AirTouch has considerable relevant experience in this area.

AirTouch submits that preserving and extending Section 252(i) rights is essential for a broad cross-section of interconnecting carriers to benefit from the protections of the 1996 Act. The core objective should be to assure that requesting carriers get the same economic benefit as the original party to the adopted agreement so that competition can develop on a level playing field.

AirTouch demonstrates that concerns expressed by LECs over state decisions which allow the terminal date of an adopted agreement to extend beyond the date of the original agreement are unfounded. Properly construed, the statutory scheme does not permit a series of follow-on carriers seeking MFN rights to extend the term of an original agreement indefinitely.

The AirTouch comments ask the Commission to issue guidelines under Section 252(i) confirming several important points: (1) In the absence of special circumstances, LECs should not be allowed to insist upon the negotiation of a confidentiality agreement

prior to responding substantively to an MFN request; (2) A requesting carrier who adopts another carriers' agreement under Section 252(i) is not automatically bound by voluntary amendments to the original agreement; (3) An interconnecting carrier may use Section 252(i) to incorporate more favorable terms into an existing interconnection agreement; (4) A requesting carrier seeking relief for a violation by a LEC of obligations under Section 252(i) is not required to follow the formal arbitration procedures specified in Section 252(b) of the Act; and, (5) The Commission should set benchmarks quantifying the "reasonable time" and "unreasonable delay" standards in Section 51.809 of the rules. Guidelines of this nature will reduce the prospect that efforts to exercise Section 252 (i) rights are delayed by collateral issues.